

'The practice of the theory of labour law' [Review] Hugh Collins, Gillian Lester, and Virginia Mantouvalou (2018) Philosophical foundations of labour law

Article (Accepted Version)

Paz-Fuchs, Amir (2020) 'The practice of the theory of labour law' [Review] Hugh Collins, Gillian Lester, and Virginia Mantouvalou (2018) Philosophical foundations of labour law. International Journal of Comparative Labour Law, 36 (2). pp. 221-235. ISSN 0952-617X

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/91143/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

The Practice of the Theory of Labour Law: A Review of *Philosophical Foundations of Labour Law* (OUP 2019)

Amir PAZ-FUCHS^{*}

An inquiry into the philosophical foundations of labour law is a challenging one, and reviewing a volume of eighteen such chapters only magnifies the challenge. The chapters in this volume cover a wide terrain, encompassing most areas of labour law and thus the intersections between law, society and the economy, within particular realms, and through particular theoretical and at times philosophical perspectives. This arguably reorganizes the inspiring ideas raised by the chapters into a 'mainstream' labour law curriculum, while weaving them through with a different strand of philosophical enquiry – that of legal philosophy, and in particular, legal realism. The review begins with the question of employment status (and the corresponding scope of labour law), turning to the contract of employment; statutory protection and employment regulation; equality and non-discrimination; and, finally, trade unions and collective labour law. It concludes with some brief observations on labour law and migration.

Keywords: Domination, Exploitation, Inequality of Bargaining Power, Scope (of Labour Law), Legal Realism

1 INTRODUCTION

AQ1

An inquiry into the philosophical foundations of labour law is a curiously paradoxical one. In one respect, as the editors of this volume mention in their excellent introduction, 'the point of labour law is to do something'¹: it is about material conditions and the relations that stem from them, not about lofty idealism. Hence the paradoxical quality.² As for the claim that it is *curiously* paradoxical, this is attributed to the fact that this engagement with the material, pragmatic sphere has, perhaps from the start, been accompanied with an effort to devise a road map charting the forest, and not only the trees: the 'how we got here' so we can better identify 'where we are going'.

^{*} Professor of Law and Social Justice, University of Sussex, UK. Email: A.Paz-Fuchs@sussex.ac.uk.

¹ Hugh Collins, Gillian Lester & Virginia Mantouvalou, *Introduction*, in *Philosophical Foundations of Labour Law* 1, 2 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds, OUP 2018).

² Guy Mundlak, *Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 8 *Theoretical Inquiries in L.* 719 (2007).

As the editors note,³ such theoretical inquiries have included the justifications to carve out a unique approach to labour law, and most prominently, to the employment *contract* as a distinct form of contract; this, in turn, necessitates a principled inquiry into what type of work (gig economy? domestic work? sex work?) merits such treatment; the legitimate constraints to be placed on managerial prerogatives; the appropriate understandings of equality in the workplace, particularly regarding the employer-employee axis, but also between employees⁴; the proper way to integrate ideas from the human rights realm – from slavery to privacy – within the labour law framework; and the arguments that can be raised against the persistent effort to further constrain trade unions and the right to strike.

It is in that context that this important contribution should be understood. The eighteen chapters cover a wide terrain, concerning most areas of labour law and thus the intersections between law, society and the economy, within particular realms, and through particular theoretical, and at times philosophical, perspectives. The editors chose to collate them across four distinct ‘parts’, corresponding with four philosophical foci – (I) Freedom, Dignity and Human Rights (which could have been termed, perhaps, ‘Liberalism’); (II) Distributive Justice and Exploitation; (III) Workplace Democracy and Self-Determination; and (IV) Social Inclusion. The structure works well, since the chapters within each part ‘speak’ to each other very clearly, at times even continuing the development of similar ideas from one to the other.

In this review, I take on a challenge to slightly reorganize the inspiring ideas raised by the chapters into a ‘mainstream’ labour law curriculum (if such a thing exists) and to weave them through with a different strand of philosophical enquiry – that of *legal* philosophy. For while the contributors to this volume offer a rich tapestry of moral and philosophical strands, it is interesting that, as we are debating not only labour, but rather labour *law*, the level of legal theory is not addressed explicitly. In particular, one particular jurisprudential approach – that of legal *realism* – surfaces and resurfaces in a good number of chapters, without being acknowledged as such. In particular, certain aspects of legal realism are particularly potent for the study of labour law in several respects: first, in its insistence that the law is indeterminate, i.e. that rules do not truly decide cases, it offers more space for critical assessment⁵; that, therefore, focusing on the facts of the cases, including the social and ideological background, will bring the law closer to social reality; and finally, that this understanding could promote social

³ Collins, Lester & Mantouvalou, *supra* n. 2, at 1.

⁴ Guy Mundlak, *The Third Function of Labour Law: Distributing Labour Market Opportunities Among Workers*, in *The Idea of Labour Law* 315 (Davidov & Langille eds, Oxford University Press 2011).

⁵ Brian Leiter, *American Legal Realism*, in *A Companion to the Philosophy of Law and Legal Theory* 249 (Dennis Paterson ed., Wiley-Blackwell 2010).

reform.⁶ For these reasons, I will endeavour to show, legal *realism* has been a true and loyal friend to labour law and labour lawyers, but recognized as such only sporadically.⁷

The sections of this review will thus follow a familiar structure but, hopefully, through reliance on the insights in the volume, also offer some unfamiliar, and at times very unfamiliar, approaches. Beginning with the question of employment status (and the corresponding scope of labour law), we then turn to the contract of employment; statutory protection and employment regulation; equality and non-discrimination; and, finally, trade unions and collective labour law. It is acknowledged that notably absent in this list, and in the volume, is a discussion of unjust dismissal and job security. I conclude with a brief observation on labour law and migration.

2 EMPLOYMENT STATUS AND THE SCOPE OF LABOUR LAW

It is curious that, at this age of the Uberification of labour law, none of the chapters has the topic of employment status as their central focus. The question of ‘who is a worker’ is, of course, not only the bedrock of employment law theory, but also carries with it crucial practical implications, most prominently whether a claimant can enjoy employment rights and protections. In other words, this question determines nothing less than the scope of the subject matter – labour law – itself. So while the interest in this question has never abated (and could never plausibly subside), it has taken on a sense of urgency with the exponential growth of atypical work, including agency work and zero-hour contracts, and of the gig economy.

Now, the fact that no chapter focuses on this issue exclusively does not mean that it is not touched on in this volume. Quite the contrary. A good place to start this particular discussion is with the chapters by Joanne Conaghan and Einat Albin,⁸ thus recognizing the important contribution of (legal) feminists, who question the exclusion of domestic work from the scope of labour law. Seeking to excavate the ‘material and philosophical roots of the distinction between paid and unpaid labour’, Conaghan finds that, ‘like any conceptual framing ... [this] distinction is no more than an intellectual contrivance which may or may not correspond at any time or place with the material realities it represents’.⁹ Such a statement is, perhaps, neatly captured by Felix Cohen’s seminal ‘Transcendental Nonsense’.¹⁰ Tracking the historical development of this cleavage (again, a

⁶ Joseph Singer, *Legal Realism Now*, 76 Cal. L. Rev. 467, 469 (1988).

⁷ James Atleson, *Values and Assumptions in American Labor Law* (University of Massachusetts Press 1983).

⁸ Joanne Conaghan, *Gender and the Labour of Law* in *Philosophical Foundations of Labour Law* (n. 2) 271; Einat Albin, *Social Inclusion for Labour Law*, *ibid* 287, 299–301.

⁹ *Ibid*.

¹⁰ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

favoured methodology among legal realists, highlighting the historical contingency of concepts and distinctions) between home and work, Conaghan explains that the distinction between paid and unpaid work ‘is not natural or inevitable’.¹¹ At the same time, Albin criticizes the range of labour law protections from which domestic workers (who, of course, are paid, but work at home) are denied.¹²

The coverage of labour law and law rights within the domain of care workers forms part of the enquiry in Virginia Mantouvalou’s chapter,¹³ one of a few that expand on the topic of exploitation, and its modern (i.e. post-Marxian) understanding. Mantouvalou’s starting point is that the state, through its laws and institutions, determines the scope of labour law, but also has a central role of facilitating exploitation through state agencies and private actors. This understanding allows her to develop the idea of structural vulnerability or, rather, the relevance of structural vulnerability to exploitation in labour law. In particular, Mantouvalou seeks to identify instances in which the law creates or exacerbates special vulnerabilities for the purpose of exploitation, for the benefit of private actors and the state.

Towards that end, she notes four case studies for the inquiry: migrant workers; domestic workers; prison work and work in detention centres; and care workers on zero-hours contracts. Whilst all are examples of exploitation, each of the four case studies raises different issues for the purpose of an inquiry into the scope of labour law, raising intriguing (and sometimes troubling) insights. The realist insight, in some cases, seems almost evident. To offer but one example: if, in the general scheme of things, the contract of employment has ‘surprisingly little coercive force’,¹⁴ since the employer can impose terms and conditions, and even change them at very little cost, it is all the more so when the consequence for leaving a place of employment is ... deportation, as in the case of migrant workers.¹⁵

Moving further into the ‘normative’ end of the world of work, Sabine Tsurada’s chapter on voluntary work¹⁶ raises an issue which, almost by definition, lies outside the realm of the employment relationship, and thus – outside the realm of labour law (unless

¹¹ *Ibid.*, at 283.

¹² Albin, *supra* n. 8, at 296–297.

¹³ Virginia Mantouvalou, *Legal Construction of Structures of Exploitation* in *Philosophical Foundations of Labour Law* (n. 2) 188.

¹⁴ Collins, Lester & Mantouvalou, *supra* n. 1, at 6; also see John Gardner’s dismissal of the ‘Holmesian view’, according to which there is no legal obligation to perform a binding contract, but only a legal obligation to either perform it or pay damages’. Gardner opines that this view ‘makes no sense’ – see *The Contractualisation of Labour Law* in *Philosophical Foundations of Labour Law* (n. 1) 33, 37.

¹⁵ J. Ewins, *Independent Review of the Overseas Domestic Worker Visa* 68 (16 Dec. 2015); Amir Paz-Fuchs, *Badges of Modern Slavery*, 79 *Modern L. Rev.* 757 (2016).

¹⁶ Sabine Tsurada, *Volunteer Work, Inclusivity and Social Equality*, in *Philosophical Foundations of Labour Law* (n. 1) 306.

AQ3

AQ4

AQ5

that status is contested).¹⁷ Voluntary work can obviously be of immense value, both for the individual and for the community served, both instrumentally (fostering a sense of community and promoting inclusion) and directly (offering support, serving food). Tsurada acknowledges this reality, whilst also recognizing the potential for abuse, as in the case of unpaid internships that are reconfigured as volunteering, precisely to avoid labour law's coverage. How are we to distinguish the two? Tsurada notes the US Supreme Court case of *Walling*¹⁸ which, somewhat notoriously, established that the individual is denied employment status if she is the 'primary beneficiary' of the relationship.¹⁹ Apart from being clearly subjective (who is to determine what is a real benefit, and to what extent the benefit for the employer is actually greater than the benefit to the individual?), this test includes a troubling subtext: that if the individual benefits 'too much', then he is not an employee at all. His reward, then, is the work itself, and therefore he need not be paid. As John Gardner notes in his chapter (to which I turn presently),²⁰ this approach suggests that work is not *supposed* to have a positive place within one's wider life, to contribute constitutively, but only instrumentally. The peculiar situation of interns takes this insight one step further – not only is work not expected to contribute more widely to one's life, but if it *does* contribute more widely, it is no longer considered employment.

But, for now, it is noted that, on the matter of the peculiar test for denying volunteers employment status, a realist approach would, perhaps, offer a more down-to-earth explanation: the economy at large – schools, hospitals, charities, and so on – has come to depend on volunteers working side-by-side with paid employees. Forcing these employers to suddenly treat those individuals as workers is practically inconceivable. As a result, courts view themselves as forced to carve out an exception to the general rule of employment status, unconvincing as that rule may be.

3 THE CONTRACT OF EMPLOYMENT

The constituent foundation of employment law – the contract of employment – is the main focus of a number of chapters: John Gardner²¹ and Hugh Collins²² hone in directly and solely on the contract of employment; Brian Langille²³ uses it as a touchstone for the ailments of the current system and a path towards a brighter future; and Mark Freedland²⁴ divides his attention between that topic and a relatively new interest, that of labour

¹⁷ *X v. Mid Sussex Citizens Advice Bureau* [2012] UKSC 59.

¹⁸ *Walling v. Portland Terminal Co.* 330 US 148 (1947).

¹⁹ *Ibid.*, at 152 (emphasis added).

²⁰ Gardner, *supra* n. 14, at 43–44.

²¹ *Ibid.*

²² Hugh Collins, *Is the Contract of Employment Illiberal*, in *Philosophical Foundations of Labour Law* (n. 1) 48.

²³ Brian Langille, *Human Development: A Way out of Labour Law's Fly Bottle* in *Philosophical Foundations of Labour Law* (n. 2).

²⁴ Mark Freedland, *Reinforcing the Philosophical Foundations of Social Inclusion* in *Philosophical Foundations of Labour Law* (n. 1) 322.

migration, to which we return below. In addition, as expected, other chapters make their own interesting observations, from different perspectives.

Gardner identifies labour law contractualization as part of a wider contractualization of social relations.²⁵ With regards to the employment relationship, Gardner identifies the ‘gradual migration of people’s working lives out of the model of the employee and into the model of the mere contractor’.²⁶ ‘Gigs’ have replaced ‘jobs’. Moreover, as Freedland highlights, whilst introducing the phrase ‘paradoxes of precarity’, contractual terms not only place workers ‘in precarious situations in which they are supremely vulnerable to ... economic risks’ but ‘by the same means place them beyond the scope of protections of labour law which they thereby more than ever need’.²⁷ He rightly notes zero-hours contracts as a prominent example of this phenomenon.

As if this insight were not sufficiently disturbing, Gardner concludes his chapter with the suggestion that the contractualization of employment also provides the justification and legitimacy for the extensive authority that employers exercise over every aspect of an employee’s life – how much time did you take going to the restroom? who did you write an email to? – since an individual can always resign and try to find a more accommodating employer. Human rights at work have been developed to balance this trend, but offer, he finds, only a ‘futile resistance’.²⁸

Hugh Collins picks up this very theme as his subject of inquiry, suggesting that ‘the contract of employment embraces an authoritarian structure that appears to be at odds with the commitment in liberal societies to values such as liberty, equal respect and respect for privacy’.²⁹ In particular, his chapter examines whether ‘the inconsistency between liberal values and the contract of employment is immanent in this legal institution’.³⁰ His starting point is an oft-cited observation by Kahn-Freund, according to which the contract of employment is ‘In its inception ... an act of submission; in its operation it is a condition of subordination’.³¹ But he continues by separating the two, suggesting that, while the condition of subordination is inherent in the employment relation because of the employee’s duty to obey an employer’s lawful instructions, submission is a

²⁵ On this see Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (OUP 2008); Peter Vincent Jones, *The New Public Contracting* (OUP 2006).

²⁶ Gardner, *supra* n. 14, at 39.

²⁷ Freedland, *supra* n. 24, at 325.

²⁸ Gardner, *supra* n. 14, at 40, 45; cf *Eweida v. United Kingdom* [2013] ECHR 37 which offers an interesting counter-example of both issues – a discussion of human rights at work, and a rejection of the claim that the power to exit the employment relationship undermines any claim for upholding rights whilst at work.

²⁹ *Ibid.*, at 48.

³⁰ Collins, *supra* n. 22, at 51.

³¹ Paul Davies & Mark Freedland, *Kahn-Freund’s Labour and the Law* 18 (3d ed., Stevens 1983).

contingent phenomenon, and a result of market forces and the (often) consequent inequality of bargaining power.

Indeed, a realist perspective would suggest that the submission to which the worker is subject is not directly related to the terms of a concrete contract for, as Collins notes:

if those terms turn out to restrict the discretion of the employer in an inconvenient way, the employer can always ignore those terms with little concern for any comeback from employees who want to keep their jobs and wages, or it can simply tear up the contract and replace it with new terms to which most existing employees will reluctantly give their assent.³²

How can workers avoid, or evade, these consequences? Some countries have been experimenting, for some time, with the radical idea of moving away from the centrality awarded to the contract of employment. Brian Langille's chapter not only articulates such a theoretical approach, but also shows its application, through a case-focused approach, thus building a bridge from high-minded political philosophy to field-level legal doctrine.³³

Beginning with two cases – one of sexual harassment of one employee by another,³⁴ the other a complaint of discrimination by temporary foreign workers against a franchisor³⁵ – Langille finds that the courts managed to assign responsibility to the respective employers by clarifying that 'the contract of employment is not determinative of the scope of accountability'.³⁶ Moreover, he suggests that those doctrinal foundations should be replaced with a 'worker-centred approach', that goes (even) beyond equalization of bargaining power.

Langille's argument recognizes that work *can* be corrosive, but it can also enhance fertile functioning and capabilities. Labour law, then, should prevent the former and promote the latter. At times, he accepts, it fails to do so. In this connection, Langille offers two disappointing Canadian examples, in which the courts refused to extend protection to workers at the bottom of the garment supply chain, and to a partner in a law firm claiming age discrimination for forced retirement.³⁷

³² Collins, *supra* n. 22, at 56; An example of the latter took place recently in the UK, when the supermarket chain Asda offered its 12,000 employees the choice between signing a new contract that strips them of a wide range of benefits, or losing their jobs. Dan Ascher, *Asda's Contract Changes Are 'Just Not Fair'*, BBC (21 Oct. 2019) <https://www.bbc.co.uk/news/business-50122703> (accessed 31 Jan. 2020).

³³ Brian Langille, *Human Development: A Way Out of Labour Law's Fly Bottle*, in *Philosophical Foundations of Labour Law* (n. 2) 87.

³⁴ *Robichaud v. Canada* [1987] 2 SCR 85.

³⁵ *United Steelworkers v. Tim Hortons* BCHRT 168 (2015).

³⁶ Langille, *supra* n. 33, at 90.

³⁷ *Ibid.*, at 98–99; *Lian v. J Crew Inc* 54 OR (3d) [2001] OJ No 1708; *McCormick v. Fasken Martineau DuMoulin LLP* SCC 39 (2014).

As Langille calls for a renewed approach, it is interesting that he insists that he is not proposing an ‘external call for a radical overhaul of our basic thinking’ but rather an ‘internal call to legal duty’. This is legal realism in its sophisticated form. Seeking the true values of law, social situations and human interactions, not fearing to draw on sources that would usually be viewed as external to the law, but making the case for their ‘internalization’, as they promote the desired function of a particular segment of law and society.³⁸

4 STATUTORY INTERVENTION IN THE EMPLOYMENT RELATIONSHIP

I would venture to guess that no employment law course could be complete without a consideration of the minimum wage, working time regulation, and other forms of regulatory interventions in the employment relationship. As expected, the chapters in this book do not address these issues in their doctrinal form, but they do offer valuable insights into their philosophical underpinnings.

Bearing in mind that many have sought to conceptualize such labour rights as human rights,³⁹ what are we to think of the somewhat-pessimistic account of human rights in the labour law world presented thus far? Do they offer only ‘futile resistance’⁴⁰ to the power of the employer, perhaps even legitimizing an illiberal regime, cloaking it in the guise of liberalism? Joe Atkinson and Pablo Gilabert seem less pessimistic, at least about the emancipatory potential, if not the reality, of labour law.⁴¹ Both view the role of labour law to improve the human condition and to protect human dignity. Thus, they are aligned with the goal of human rights which, for Gilabert, find their further justification in human dignity⁴²; whereas Atkinson sets out to develop a rights-based justification for labour law, as an alternative to the social justice or efficiency approaches.

But what would it mean to have human rights serve as a ‘foundation’ of labour law, as opposed to (simply?) promoting human rights and dignity within the workplace? Atkinson, for example, mentions that some political theories of human rights embrace an ‘interpretivist’ method, ‘seeking to develop the most normatively attractive theory that has the requisite degree of fit’.⁴³ Similarly, Gilabert suggests that a dignitarian approach

³⁸ H. Dagan & M. Heller, *The Choice Theory of Contracts* 72 (Cambridge: CUP 2017); S. Deakin & F. Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, in *Legal Regulation of the Employment Relations* (H. Collins, P. Davies & R. Rideout eds, Kluwer 2000) 45. And see similarly H. Collins, *Regulating Contracts* 181 (Oxford: OUP 1999).

³⁹ Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 Eur. L. J. 151 (2012); *Labour Rights as Human Rights* (Philip Alston ed., OUP 2005).

⁴⁰ Gardner, *supra* n. 14, at 40, 45.

⁴¹ Joe Atkinson, *Human Rights as Foundations for Labour Law*, in *Philosophical Foundations of Labour Law* (n. 1) 122; Pablo Gilabert, *Dignity at Work*, *ibid* 68.

⁴² Gilabert, *supra* n. 41, at 75, 77.

⁴³ Atkinson, *supra* n. 41, at 127.

may assist in developing labour law beyond ‘minimalist’ rights. Courts may be instrumental in this regard. For example, Mark Freedland recently wrote that the ‘conspicuously wide range of norms’ which serve as sources for interpretation ‘confer upon the judges ... an extensive latitude of choice as to the sources upon which they may draw’.⁴⁴ The idea, then, would be that, recognizing the wide discretion enjoyed by judges – a central tenet for legal realism⁴⁵ – they should be constrained by the need to advance human rights.

It is interesting to note that whilst a dignitarian approach, like a human rights approach, is reputedly individualistic,⁴⁶ Gilabert seeks to develop the former to correspond with the paradigm that has at its centre the aim of enabling workers to avoid domination and exploitation. The advantage of structural approaches lies in their awareness to power, to direct and indirect forces, and to the various ways in which coercion may be manifested. In the context of the volume as a whole, the discussion links up nicely the chapters which offer a more ‘individualistic’ account (e.g. human rights) with those that have a ‘structural’ focus (e.g. non-domination).

This bridge is worth constructing, indeed. It was noted above that not all jobs allow individuals to prosper with dignity. And yet, notwithstanding this truism, it may be countered with the puzzle posed by Jonathan Wolff, that ‘often the only thing worse than being exploited is not being exploited’.⁴⁷ Albin, in her discussion of ‘unfavourable (social) inclusion’ similarly refers to jobs that are ‘better than nothing’ leading,⁴⁸ perhaps, to labour inclusion with social exclusion, and thus ‘a denial of social justice in general’.⁴⁹

In all of these perspectives, one notices a clear trend away from grounding the justification for such interventions in the trusted, but worn, inequality of bargaining power. Horacio Spector⁵⁰ and Wolff, for example, seek to pave the way from inequality of bargaining power – still ‘by far the most widely accepted’⁵¹ account of labour law – to a modern, post-Marxian, approach to exploitation. David Cabrelli and Rebecca Zahn go further, suggesting that inequality of bargaining power should be slowly discarded as a foundation for labour law, and replaced by theories of republicanism and non-domination. As they explain, the former justification has been criticized for its lack of precision, for being under-inclusive, and

⁴⁴ M. Freedland, *The Legal Structure of the Contract of Employment* in *The Contract of Employment* 28, 35 (M. Freedland et al., eds, OUP 2016).

⁴⁵ H. Dagan, *Doctrinal Categories, Legal Realism and the Rule of Law*, 163 Univ. Pa. L. Rev. 1889, 1903 (2015); K. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1385 (1940).

⁴⁶ Atkinson, *supra* n. 41, at 125.

⁴⁷ Jonathan Wolff, *Structures of Exploitation* in *Philosophical Foundations of Labour Law* (n. 1) 174.

⁴⁸ Albin, *supra* n. 16, at 296.

⁴⁹ Paz-Fuchs, *supra* n. 25, at 197.

⁵⁰ Horacio Spector, *A Risk Theory of Exploitation*, in *Philosophical Foundations of Labour Law* (n. 1) 205.

⁵¹ Guy Davidov, *A Purposive Approach to Labour Law* 52 (OUP 2016).

AQ10

AQ11

for being over-inclusive.⁵² What we need, it seems, is a different paradigm on which to rest our pursuit of social justice and, in particular, our interpretation and development of labour law. This is suggested in the form of civic republicanism.

Under this construction, individual consent is far less important than the structural vulnerability, as already encountered, leading the worker to agree to the exploitative conditions. Wolff and Spector's analyses complement each other nicely, offering not only a philosophical exposition of exploitation, but also (with Spector) one that offers some economic theorization (audaciously, including a graph, in a collection intended for the philosophy oriented!). Wolff's theory is thus complemented by, and to an extent grounded in, Spector's material history, which is clearly indebted to, but goes beyond, Marx. This part of the argument can be summarized, in his own words, as follows: 'Whereas the capitalist can freely spread the risk of capital loss by diversifying his investment portfolio, increasing specificity of labour leads the wage worker into a highly concentrated use of his talents and skills. This puts the worker in a vulnerable position'.⁵³

As persuasive as these arguments are, it is worth noting, by way of an intermediate summary, that the liberal, who places the individual (along with her freedom to choose) at the centre, and the structuralist (in this case, a Marxist structuralist), are talking past each other, as it were, creating no meaningful, fruitful, engagement. So the question is: is it possible to hold both, simultaneously? Spector discusses the work of Nicholas Vrousalis, who seems to do just that, by exploring the concept of domination, and arguing that it can be identified when the capitalist instrumentalizes the worker's systemic, economic vulnerability in a way that is *disrespectful* to the worker. Here we find an interesting effort to engage non-domination as a way to join the appreciation for individualistic values, such as dignity and respect (and, to an extent – exploitation), alongside systemic approaches, such as inequality of bargaining power.⁵⁴

Cabrelli and Zahn chart the path forward in Dworkinian 'fit' and 'justice' fashion – first explaining how the account of 'social justice as non-domination' offers an accurate description of the current scope and issues addressed by labour law; and, second, by offering a normative agenda for further development of the field through the new paradigm.⁵⁵ Thus, two of the leading writers who are celebrated for developing the field, Philip Pettit and Frank Lovett, both view non-domination as a central attribute of social justice, whilst choosing to highlight

⁵² David Cabrelli & Rebecca Zahn, *Civic Republicanism Political Theory and Labour Law*, in *Philosophical Foundations of Labour Law* (n. 1) 104.

⁵³ Spector, *supra* n. 50, at 218.

⁵⁴ Nicholas Vrousalis, *Exploitation, Vulnerability and Social Domination*, Phil. & Pub. Aff. 1; Spector, *supra* n. 50, at 212–213 (2013).

⁵⁵ Cabrelli & Zahn, *supra* n. 52, at 116–121.

‘freedom’ (Pettit) or a socially just order (Lovett) en route.⁵⁶ Building on this paradigm, Cabrelli and Zahn suggest that the national minimum wage, equal pay laws and working time regulations, as well as the implied term of mutual trust and confidence for example, limit the degree to which the employer can exploit its market advantage to the detriment of the worker. As may be expected, the normative agenda could support the expansion of the scope of labour law to mitigate the domination that is present not only through the contract of employment, but also through other market relations.

5 EQUALITY

The discussion regarding equality (in labour law, as well as in law and society more generally) is qualitatively different from the one concerning statutory intervention to secure labour rights. For while some may argue that labour rights **should not be recognised as human rights**, and that statutory intervention in the employment relationship is illegitimate *per se*, equality has been lauded as an ideal since time immemorial, even by societies who proceeded to interpret the demands of equality as happily cohabiting with slavery and the subjection of women, for example. Therefore, we are destined to continue the inquiry: *how* are we to understand the demands of equality and (more concretely) non-discrimination in the context of labour law?

The challenge, as Noah Zatz conceives it, is that the courts often understand the justification for, and thus – the interpretation of – non-discrimination in the failure of employers ‘to fully commodify workers by treating them strictly as factors of production’.⁵⁷ However, there is a limit to this understanding, Zatz notes, since courts (let alone academics) refuse to accept ‘rational discrimination’ which is based, for example, on the reliance on customer satisfaction to be served (or not) by workers of a particular race or gender.⁵⁸

The literature and case law concerning indirect discrimination offer further grounds to develop an alternative, and more suitable, justification, seeking to ‘dismantle caste-like relationships of structural subordination among groups ... [towards] an explicit incorporation of distributive justice aims’.⁵⁹ This would be done, Zatz suggests, by refocusing our attention on the injury suffered by a worker because of his or her protected status. Crucially, this explanation would assist

⁵⁶ *Ibid.*, at 113; Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010); Philip Pettit, *Justice*, in *Oxford Studies in Political Philosophy* 9 (David Sobel, Peter Vallentyne & Steven Wall eds, vol 1, OUP 2015).

⁵⁷ Noah Zatz, *Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination in Philosophical Foundations of Labour Law* (n. 1) 156.

⁵⁸ *Ibid.*, at 166.

⁵⁹ *Ibid.*, at 163.

courts in developing a coherent approach to the issue of ‘discriminatory tests’ – tests that are adopted by employers to determine which workers merit a job offer or promotion, and that are later found to have a disparate impact on different racial groups. This issue has been addressed by the US Supreme Court for over half a century,⁶⁰ but only recently attracted the same level of interest in the UK.⁶¹ In one such US case, the employer sought to defuse the situation by hiring other African Americans at a higher rate.⁶² The Court rejected this ‘bottom line defense’, and it was right to do so, Zatz explains, even if its reasoning is unclear. While the injury was identified at the group level, it was suffered by individuals who took the test. Since workers are not ‘fungible’, the injury cannot be ‘cured or offset by awarding promotions to other African Americans’.⁶³

This approach, he explains, neatly aligns with liberal egalitarian approaches. In particular, it can be viewed as an application of ‘luck egalitarianism’, the idea that the distribution of resources should be allocated according to an individual’s actions over which she has control, and should not be influenced by morally arbitrary factors.

This is the intellectual starting point for Guy Davidov’s contribution.⁶⁴ He finds that arguments grounded in luck egalitarianism would support prohibition of direct discrimination on the grounds of race, gender or religious affiliation, for example; for equal pay laws for men and women; and pay equity for agency workers, part-time workers and fixed-term workers.

Can this philosophical foundation of luck egalitarianism take us beyond what is currently the norm in employment law? Davidov (and others)⁶⁵ would argue that, for example, luck egalitarianism would support affirmative action programmes (which, if understood as hiring a member of an underrepresented minority group for that reason, are illegal in the UK, for example).⁶⁶ Less intuitively, he also suggests, through reliance on John Rawls, that it would support minimum and maximum wage laws and the strengthening of union power.⁶⁷

Davidov’s contribution is probably best understood more as a call for future reform and interpretation of (and thus – developing) the law, than an articulation of existing foundations. He encourages us to turn our attention to the fate of

⁶⁰ *Griggs v. Duke Power Co* 401 US 424 (1971).

⁶¹ *Essop v. Home Office* UK 27; Sandra Fredman, *Direct and Indirect Discrimination: Is There Still a Divide?*, in *Foundations of Indirect Discrimination Law* 31 (Hugh Collins & Tarunabh Khaitan eds, Hart 2018).

⁶² *Connecticut v. Teal* 457 US 440 (1982).

⁶³ Zatz, *supra* n. 57, at 168.

⁶⁴ Guy Davidov, *Distributive Justice and Labour Law*, in *Philosophical Foundations of Labour Law* (n. 1) 141.

⁶⁵ John Roemer, *Defending Equality of Opportunity*, 86 *The Monist* 261 (2003); Shlomi Segall, *Equality and Opportunity* (OUP 2013) Chs 4–5.

⁶⁶ Davidov, *supra* n. 64, at 150.

⁶⁷ *Ibid.*

employees who are not identified by protected characteristics such as race and gender: those in the precarious labour market, the non-unionized workers, forming the lower tier, who are not currently considered to have a claim for protection. There is much that can be done in this regard, and surely much more than courts acknowledge in some countries, most notably the UK.⁶⁸ Complementing Langille's 'worker-centred' approach, then, Davidov and Zatz offer the courts a paradigm for progressive interpretation, and the legislature one for statutory reform.

6 COLLECTIVE LABOUR LAW

Finally, as is the case with most employment law textbooks and teaching modules, we conclude with the philosophical foundations of the law concerning collective labour law. The path in this respect is by no means untrodden. In particular, the justification for strong trade unions and their actions, including collective bargaining and the right to strike, has been grounded in supporting worker voice,⁶⁹ in promoting democracy in general and workplace democracy in particular,⁷⁰ and in serving as the most reliable counterweight to the inequality of bargaining power, and political equality more generally.⁷¹

The latter is the concern of the chapter by Martin O'Neil and Stuart White.⁷² They find a causative relationship between the decline of trade unions and the 'oligarchic shift' – the accumulation of wealth and, consequently, power, to the extent that some Western nations can no longer be considered democratic, but rather should be considered 'post democratic'.⁷³ Thus, the decline in union representation and activity has, at least partly, led to the decline in voter turnout, in the distribution of political information, in the willingness to engage in democratic politics, in a 'representational deficit' for working class interests; and in democratizing control over financial investment through union controlled collective investment funds. In light of the above, what stance should the state take?

In a passage that is a fine example of legal realism, O'Neil and White argue that 'doing nothing' is not enough. The reason being that there is no 'legal

AQ15

⁶⁸ Amir Paz-Fuchs, *It Ain't Necessarily So: A Legal Realist Approach to Agency Work*, Modern L. Rev. (2020) [forthcoming].

⁶⁹ Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest*, in *Voices at Work: Continuity and Change in the Common Law World* 141 (Alan Bogg & Tonia Novitz eds, OUP 2014).

⁷⁰ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009).

AQ16

⁷¹ Martin O'Neil & Stuart White, *Trade Unions and Political Equality in Philosophical Foundations of Labour Law* (n. 1) 252.

⁷² *Ibid.*

⁷³ Colin Crouch, *Post-Democracy* (Polity Press 2004); Jacob Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer and Turned Its Back on the Middle Class* (Simon & Schuster 2010).

vacuum': under the common law, trade union activities immediately come into conflict with the laws of contract and property. They quote Alan Bogg, who explains that "neutral" enforcement of freedom of contract means that workers can be dismissed with impunity for choosing to support the union'.⁷⁴ Against this background, the authors argue that the state should take a 'promotive stance', which would change the default setting to union membership and recognition, accompanied with clear obligations on employers to negotiate with unions.⁷⁵ In support of their position, one could suggest that, as it has been established that unions are a good thing, they *should be promoted*. Thus, precisely in the same way that Cass Sunstein and Richard Thaler support 'nudging' workers to take part in pension schemes by changing the default rules,⁷⁶ one could imagine a simple analogy to trade union membership, and for very similar reasons.

The increasing popularity of the republican ideal of non-domination as an explanatory and normative force in employment law was noted above. A further, perhaps even stronger, indication that this paradigm is increasingly moving to replace inequality of bargaining power in this regard is made manifest in the chapter by Alan Bogg and Cynthia Estlund on the right to strike.⁷⁷ Here, three of the 'basic liberties' identified by Pettit – freedom of expression ('voice'), freedom of association ('associate') and the freedom to change occupation ('exit') – are identified as particularly relevant to the employment sphere. All three are almost intuitively supportive of a strong right to strike.

Bogg and Estlund then turn to assess how three jurisdictions – the US, the UK and Canada – fare with regards to the right to strike against this current foundation. This examination is advanced across four queries: What is the scope of the right to strike? What constitutes its infringement? Can the right to strike be waived? And can the right be limited based on its target or purpose?

This comparison of positive law against a normative framework is an excellent and quite illuminating exercise. It is, unsurprisingly, also welcomed by legal realists, who would unhesitatingly sign off on the authors' acknowledgement that:

labour law scholars often prefer to bring a dose of pragmatism to the regulatory challenges of worker emancipation, evincing a concern for what works in practice, rather than what works in theory. That is all well and good, but any assessment of 'what works' should be informed by a rational account of normative values, as a prelude to assessing whether those values are being realized in the real world of work.⁷⁸

⁷⁴ Alan Bogg, *New Labour, Trade Unions and the Liberal State*, 20 King's L.J. 403, 417 (2009); O'Neil & White, *supra* n. 71, at 264.

⁷⁵ O'Neil & White, *supra* n. 71, at 265.

⁷⁶ Cass Sunstein & Richard Thaler, *Nudge: Improving Decisions About Health, Wealth and Happiness [Full Title]* (Penguin, 2009).

⁷⁷ Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship in Philosophical Foundations of Labour Law* (n. 1) 229.

7 CONCLUSION – LABOUR MIGRATION

The editors of this volume, in their wisdom, chose to place Mark Freedland's chapter as its bookend, and within it, the final pages are dedicated to the matter of labour migration, perhaps the most urgent issue on the horizon of labour law practice and scholarship. It is probably the case that many labour law modules have not yet found the place to dedicate time to labour migration as a coherent, distinct topic, but the growing scholarship on the matter may provide the impetus and structure to do so before too long.⁷⁹ For now, Freedland does not offer much reason for (political, rather than intellectual) optimism. He suggests that we are increasingly designing an era characterized by 'isolated workers in isolated states' – the closing down of borders to labour migrants – leading states to become increasingly wedded to the 'on-demand economy' and hyper-flexible, zero-hours contracts⁸⁰. For those who find that this insight offers more brute real politics than 'high minded' philosophy, there is a response: the chapters in this volume offer the view, as philosophy is always destined to, that another world is always possible. A world in which non-domination, civic engagement, social inclusion and equality are of central concern. They also show, at times explicitly, at times implicitly, that where labour law regulation and cases embrace other values, leading to exploitation and isolation, it can and should be criticized. As such, this volume could never be more timely.

⁷⁸ *Ibid.*, at 250.

⁷⁹ Cathryn Costello & Mark Freedland, *Migrants at Work – Immigration and Vulnerability in Labour Law* (OUP 2014).

⁸⁰ Freedland, *supra* n. 19, at 334.

